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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1227

RALPH KEMP, WARDEN
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner,

v.

HORACE WILLIAM DIX,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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13 pp

QUESTION PRESENTED

The Court of Appeals Below, Applying the Standard Established by This Court in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), Correctly Held that the Unconstitutionally Burden Shifting Jury Instruction in Petitioner's Case Was Not Harmless Error.

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

(i) Procedural History 1

(ii) Statement of Facts 3

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases	Pages
Dix v. State, 239 Ga. 209, 232 S.E.2d 47 (1977)	1
Dix v. Kemp, 763 F.2d 1207 (11th Cir. 1985)	2
Dix v. Kemp, 804 F.2d 618 (11th Cir. 1986)	2
Dix v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc)	passim
Francis v. Franklin, 471 U.S. 307 (1985)	7,8
Patterson v. State, 238 Ga. 409, 238 S.E.2d 2 (1977)	8
Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986) . . .	7
Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986). . .	2,7,8
Sandstrom v. Montana, 442 U.S. 510 (1979)	7
Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985), vacated and remanded for further consideration, ___ U.S. ___, 106 S.Ct. 3325, on remand, 800 F.2d 1025 (11th Cir. 1986)	7
State Statutes	
Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a)	8

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

(i) Procedural History

Respondent, Horace Dix, was convicted in the Superior Court of Clayton County, Georgia for murder of his recently divorced spouse and the kidnapping of three family members. He was sentenced to death for the murder and terms of imprisonment for the kidnappings.[1]

On direct appeal, the convictions and sentences were affirmed by the Supreme Court of Georgia. Dix v. State, 239 Ga. 209, 232 S.E.2d 47 (1977). After state post conviction proceedings, including a petition for writ of habeas corpus and an extraordinary motion for new trial, Horace Dix filed a Petition for Writ of Habeas Corpus in the district court below (R. Vol. I at 5).

1. The kidnapping convictions are not in issue here.

On March 20, 1984, the district court below entered its final order. The district court granted habeas corpus relief as to Horace Dix's death sentence only finding that the jury instructions at the penalty phase of trial were constitutionally inadequate. The Writ was denied on all other grounds raised. (R. Vol. II at 311). An appeal and cross appeal were taken.

On June 5, 1985, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's finding that the jury instructions at the penalty phase of trial were constitutionally inadequate; the panel also held that the jury instruction at the guilt/innocence phase of Horace Dix's trial was unconstitutionally burden shifting. Dix v. Kemp, 763 F.2d 1207 (11th Cir. 1985).

On October 28, 1986, subsequent to this Court's decision in Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (1986), the panel withdrew its opinion of June 5, 1985 and entered a substituted opinion finding that the jury instruction at the guilt/innocence phase of Horace Dix' trial was unconstitutionally burden shifting. Since this issue was dispositive of the case it was unnecessary to reach the issue of the jury instructions at the sentencing phase of trial. Dix v. Kemp, 804 F.2d 618 (11th Cir. 1986).

On January 26, 1987, the Court of Appeals granted rehearing en banc. On October 22, 1987, the Eleventh Circuit en banc, per Judge Vance, upheld the panel opinion that the unconstitutionally burden shifting jury instruction in Horace Dix's case was not harmless error under the standard of Rose v. Clark, supra. Dix v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc).

(ii) Statement of Facts

Horace Dix, a person with absolutely no prior criminal record, was convicted of the murder of Dixie Jordan, whom he had recently divorced, and the kidnapping of three members of the family.

Horace Dix was born in Carrollton, Georgia in 1937. In 1956, he entered the Navy, where he remained for four years until he suffered a severe head injury which required the insertion of a metal plate into his skull. He was then discharged from the Navy on 100% mental disability. Relatives noted that after this time, Horace, although remaining a sweet, gentle person (T Trial 211, 598, 669), experienced certain personality changes (T Trial 578, 670). He was unable to maintain his employment at the Ford Motor company assembly plant because he suffered periods of mental lapses during work where he would blackout and allow a number of items to pass him without his attention. Also, after leaving the Navy, Horace was in an automobile accident from which he spent over a year in the hospital recouperating (T Trial 1060).

Horace Dix' first marriage ended in a divorce, with custody of the only child being awarded to Horace and his mother (T Trial 1059).

Horace's second marriage was to Dixie Jordan, the deceased in this case. She was openly unfaithful to Horace and even taunted him with her conduct (T Trial 1056-7). Horace Dix and Dixie Jordan had been divorced for only a month when the offense occurred.

On the afternoon of September 8, 1974, Horace Dix was sitting outside the victim's house waiting for her when she and her mother drove up. Dixie stayed to talk with Horace and told her mother to leave. Later, Dixie called her mother and told her to come over for dinner. Sometime during that evening, Horace

and Dixie argued, then Dixie threw an ashtray at Horace. From that point on, Horace could later remember nothing of what happened (T Trial 1956), [as acknowledged by Drs. Bosch and Sapp (T Trial 853; 703-4) at trial, and Drs. Johnson and Kaufman (T. Ex. Mo. 11-15; 91-96 respectively) at his Extraordinary Motion for a New Trial in 1979], until days later when he heard on the radio that Dixie had been killed. According to the victim's mother, sister and niece, when they went to Dixie's house later that evening, Horace refused to let them see Dixie; he then forced them to get into his car and told them Dixie would never be hurt again. They were able to escape unharmed when he stopped to let Dixie's niece go into the grocery store to get something to drink. A couple of days later, he called the police and surrendered, crying and disoriented, and exhibiting inappropriate behavior, showing more concern over a pair of torn pants than impending arrest for murder (T Trial 121). During his stay in jail he wondered why Dixie never came to visit him. (T Trial 733).

As the evidence at trial would show, Horace Dix had a violent confrontation with the victim during which he strangled her with a towel and killed her with multiple stab wounds.

The expert witness for the defense, Dr. Sapp, a psychiatrist who had examined Horace Dix in 1974-5, diagnosed Horace as having a psychotic condition, namely schizophrenia, paranoid type. And that he had suffered since 1959, the date of his severe head injury, from an organic brain syndrome caused by brain damage or trauma which frequently manifests itself in seizure disorders, i.e. petit mal convulsions and psychomotor seizures (T Trial 802). Dr. Sapp noted that due to Horace Dix' mental disorder an emotional shock could trigger a psychotic episode involving psychomotor seizures and memory loss (T Trial 712), during which he would be able to perform physical tasks normally, but at the

same time would not know or be conscious of his actions (T Trial 756).

The court's appointed expert, Dr. Bosch, a psychiatrist and neurologist, employed at Georgia's Central State Hospital, basically confirming Dr. Sapp's testimony, testified that Horace Dix was suffering, and continued to suffer, at the time of the offense, from an emotional disorder or illness called depressive neurosis. Dr. Bosch testified that probably at the time of the offense he was depressed about his recent divorce and that this depression was even more acute at the time of the trial because of the additional factor of the loss of her person (T Trial 810-11). The doctor noted that while Horace Dix appeared to know the difference between right and wrong at the time of his examination in 1975, Dix continued to suffer from the depressive neurosis, as well as from organic brain damage evidenced by his unusual electroencephlogram. According to Dr. Bosch, as a result of this brain damage or trauma, Horace Dix suffered from psychomotor seizures manifested by sensory and perceptual distortions, convulsions, confusion and loss of consciousness without loss of the ability to act, and memory loss during the period of the seizure which could last for a period of time from a couple of minutes to a couple of days. The doctor also noted that at the time of the trial, Horace was so depressed that he had to be medicated in order to stand trial (T Trial 840, 853-854).

Drs. Kaufman and Johnson testified at the 1979 Extraordinary Motion for a New Trial hearing. In essence, their diagnoses of Horace Dix were very similar to Drs. Sapp's and Bosch's testimony during Horace Dix' trial in 1975. Both doctors said that Horace Dix suffered and continued to suffer from severe emotional disorders which were typified by an inability to express, normally, his anger and fears, which resulted in periodic

explosions and violence, an emotional state that is accompanied by physical manifestations of loss of consciousness without loss of the ability to act, seizures, sensory distortions, delusions and confusion and loss of memory (T Ex. Mo. 77), during which time he is not only not able to control what he does, but is not even conscious of it (T Ex. Mo. 13-15, 63).

According to Dr. Johnson, who examined Horace in 1977, his disorder was a product of a psychological breakdown of his ability to deal with reality in a rational, conscious fashion. This emotional disorder, which Dr. Johnson labeled as a psychogenic amnesia (T Ex. Mo. 55, 56) was typified by a flat or not responsive emotional state or affect, wherein he failed to show even the minimally normal concern expected of a person facing death for the murder of his wife, while he evidenced inordinate concern for irrelevant and insignificant more immediate events (T Ex. Mo. 45, 60).

According to Dr. Kaufman, Horace was suffering from an hysterical dissociative reaction (T Ex. Mo. 92), triggered by enormous anger as a "result of this taunting of his wife toward him and a long history of bottled-up rage, with the disassociative reaction causing his memory loss for a long period of time" (T Ex. Mo. 90). It is frequently called a passive/aggressive personality disorder, i.e., in addition to having some signs of schizophrenia, he has a tendency to be quite passive, to be easily influenced, and he has a tendency to bottle up anger. (T Ex. Mo. 90).

Both Drs. Johnson (T Ex. Mo. 11, 14,1 5) and Kaufman (T Ex. Mo. 91, 93, 96), as well as the two experts who testified at trial, believed Horace Dix was telling the truth when he continued to be unable to remember the events surrounding the crime, although he believed them when they told him he had killed the victim. And though he appeared to want to remember what

happened (T Ex. Mo. 95), any attempt to remember was associated with severe anxiety and fear (T Ex. Mo. 18, 19) to the point where he would become totally withdrawn, disoriented, and suspicious.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Contrary to the assertions of Petitioner in his Petition for Writ of Certiorari, the Court of Appeals below did a careful analysis of the harmless error issue under the standard established by this Court in Rose v. Clark, supra and determined that under the facts of Horace Dix's case the unconstitutionally burden shifting jury instruction given at Horace Dix's trial was not harmless error. Contrary to Petitioner's assertions, the Court of Appeals did not establish any per se rule concerning harmless error where jury instructions violative of Francis v. Franklin, 471 U.S. 307 (1985) and Sandstrom v. Montana, 442 U.S. 510 (1979) are given.

Horace Dix was tried and convicted of malice murder. Under Georgia law, malice and intent are essential elements of malice murder. Ga. Code Ann. §26-1101(a); OCGA §16-5-1(a). Francis v. Franklin, 471 U.S. at 315, n. 4. Under Georgia law insanity is an affirmative defense which the accused must establish by a preponderance of the evidence. However, a defense of insanity is entirely separate and distinct from the State's burden to prove malice and intent beyond a reasonable doubt. Raising the affirmative defense of insanity does not relieve the State of its burden of proof of malice and intent; an insanity defense is in no way inconsistent with a defense that the State has failed in its affirmative burden to prove malice or intent beyond a reasonable doubt. See, e.g., Pope v. State, 256 Ga. 196, 345 S.E.2d 831, 843-844 (1986); Thomas v. Kemp, 766 F.2d 452 (11th Cir. 1985), vacated and remanded for further consideration, ___

U.S. ___, 106 S.Ct. 3325, on remand, 800 F.2d 1025 (11th Cir. 1986) (reinstating in relevant part the original opinion).

The Supreme Court of Georgia has explicitly stated in explaining the Georgia law in Patterson v. State, 239 Ga. 409, 238 S.E.2d 2, 8 (1977): "Malice incorporates the intent to kill and is an element [of malice murder] . . . the state must prove malice; defendant does not have to disprove it." (emphasis added).

As was discussed in the Statement of Facts, supra, considerable evidence exists that Horace Dix did not possess the requisite malice or intent.

At trial Horace Dix presented substantial evidence of a history of mental illness resulting in unstable behavior. Every psychiatrist who has examined Horace Dix agrees that he has no memory of the events immediately preceding or resulting in the death of Dixie Jordan, the victim. Substantial medical evidence was presented at trial which showed that Horace Dix suffered from periods of blackouts, psychomotor seizures, and psychotic episodes triggered by emotional shock.

As this Court noted in Rose v. Clark, 106 S.Ct. at 3109, the case by case analysis of harmless error is better left to the Courts of Appeal. The en banc Eleventh Circuit carefully analyzed the Rose v. Clark harmless error issue and determined that under the facts of Horace Dix's case, the Franklin - Sandstrom error in his case was not harmless.

CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 11th day of February, 1988.

Joseph M. Nursey
COUNSEL FOR PETITIONER

CONCLUSION

Respondent Dix, for the reasons stated above, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

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